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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

Abdul Malik Abdul Kareem,

Defendant.

No. CR-15-00707-01-PHX-SRB

**ADDENDUM TO GOVERNMENT'S
RESPONSE TO SUPPLEMENTAL
MOTION FOR NEW TRIAL**

The United States, through undersigned Counsel, respectfully submits the following information and argument as an addendum to its response to Kareem's Supplemental Motion for New Trial.

Timeliness of Kareem's Addendum

While preparing the response to Kareem's Motion to Dismiss, undersigned counsel reviewed the various filings in this case and realized Kareem's Addendum to his Supplemental Motion for New Trial, which raised the issues of post-trial disclosure of pole camera footage, the extraction of Saabir Nurse's cell phone, and Nurse's passport and travel records, was filed more than three years after the verdict in this case. Federal Rule of Criminal Procedure 33 requires a motion for new trial

1 to be filed within three years of the date of the return of the guilty verdict in a
2 criminal case. The jury returned its verdict in this case on March 17, 2016. Kareem
3 filed his Addendum in support of his Supplemental Motion for New Trial on April
4 26, 2019, more than one month past the three-year deadline from the date of the
5 jury's verdict.

6 Rule 33 sets forth a "rigid," "inflexible," "claim-processing rule"¹ that must
7 be followed if properly asserted before a court reaches the merits of a motion for
8 new trial. *Eberhart v. United States*, 546 U.S. 12, 13, 19 (2005) (discussing previous
9 Supreme Court and circuit court decisions referring to time limits in criminal and
10 civil rules as both "jurisdictional" and "claim-processing" rules, and concluding
11 Rule 33 sets forth a "claim-processing" rule). In *Eberhart*, the government
12 responded on the merits to an untimely supplemental memorandum in support a
13 motion for new trial. *Id.* at 13-14. The district court subsequently granted the
14 motion.

15 The government appealed, asserting untimeliness, and the court of appeals
16 reversed. The court of appeals relied on language in prior Supreme Court cases² in
17 finding Fed. R. Crim. P. 33 and 45(b) set forth jurisdictional time limits that could
18 be raised for the first time on appeal. *Id.* at 14. The Supreme Court reversed, finding
19 that although its prior decisions used the word "jurisdictional," the central point of
20 the prior decisions was that "when the Government objected to a filing untimely
21 under Rule 37, the court's duty to dismiss was mandatory." *Id.* at 18. The Court
22 noted the net effect of its prior opinion in an intervening case was "to admonish the
23 Government that failure to object to untimely submissions entails forfeiture of the
24 objection, and to admonish defendants that timeliness is of the essence" *Id.*

25
26 ¹ The government incorrectly relied on earlier cases that referred to Rule 33 as
27 jurisdictional in its response to Kareem's Motion to Dismiss. Undersigned counsel are
contemporaneously filing a notice of errata with respect that assertion.

28 ² *United States v. Robinson*, 361 U.S. 220 (1960), and *United States v. Smith*, 331
U.S. 469 (1947).

1 The Court went on to note that “Rule 33 . . . is a claim-processing rule – one
2 that is admittedly inflexible because of Rule 45(b)’s insistent demand for a definite
3 end to proceedings. These claim-processing rules thus assure relief to a party
4 properly raising them, but do not compel the same result if the party forfeits them.”
5 *Id.* at 19. Although the Court in *Eberhart* addressed the time limit for new trial
6 motions based on reasons other than newly-discovered evidence in Rule 33(b)(2),
7 its analysis applies with equal force to newly-discovered evidence claims under Rule
8 33(b)(1). *See United States v. Berry*, 624 F.3d 1031, 1038-39 (9th Cir. 2010) (citing
9 *Eberhart*, construing claims raised in § 2255 motion based only on newly-discovered
10 evidence as motion for new trial under Rule 33 and finding them untimely under
11 Rule 33(b)(1)).

12 In this case, Kareem filed his Addendum to his Supplemental Motion for New
13 Trial on April 26, 2019. (CR 541.) Because the Addendum raised new claims in
14 support of the Supplemental Motion for New Trial more than three years after the
15 jury’s March 17, 2016, verdict, the Addendum is untimely. Kareem may point to
16 the fact that the items raised in the Addendum (the pole camera video and extraction
17 of Saabir Nurse’s cell phone) were disclosed on March 15, 2019, as the reason for
18 the late filing. However, the government informed Kareem more than a month
19 earlier that those items existed. (*See* CR 534 at 2-3 (Reply in support of Kareem’s
20 Amended Motion to Compel Disclosure filed 2/26/19 and referring to having
21 received notice of the pole camera and cell phone extraction two weeks earlier).)
22 Kareem could have timely filed an addendum raising the existence of those items
23 prior the three-year deadline and then soon thereafter submitted a more fulsome
24 analysis of those items. Importantly, a mechanism remains available to Kareem to
25 raise those his constitutional claims about the pole camera footage and the cell phone
26 extraction under 28 U.S.C. § 2255.

27 The government respectfully submits it has objected to the filing’s
28 untimeliness prior to the Court’s having reached the merits of the Supplemental

1 Motion for New Trial, and therefore the Court should reject the Addendum as
2 untimely.

3 **Pretrial Notice to the Defense Regarding**
4 **Simpson-UCE Communications**

5 In preparation for the evidentiary hearing set for October 15, 2019,
6 undersigned counsel reviewed search warrant applications and affidavits that agents
7 submitted to the Court in the immediate aftermath of the Garland attack. In
8 reviewing the affidavits, undersigned counsel discovered the following paragraphs
9 in the search warrant affidavit for Simpson's Surespot, Whatsapp, and Google+
10 accounts:

11 29. Based on my training and experience, terrorists use social
12 media sites and messaging applications such as Surespot, WhatsApp,
13 and Google+, to exchange terrorist training videos, share manuals and
14 doctrine, provide bomb making instructions and promulgate support for
15 extreme violent ideology. Terrorists also often use such sites and/or
16 applications to communicate to one another regarding plans for attacks.
17 It is reasonable to believe that Simpson and Soofi communicated,
18 conspired, shared or received ideas through their various social media
19 sites to coordinate and execute the attack on May 3, 2015 in Garland,
20 Texas.

21 30. On or about April 23, 2015, Simpson, utilizing Surespot
22 Account Juba1911, conversed with an FBI Undercover Employee
23 (UCE).

24 (Attachment 1, Search Warrant No. 15-7328MB at 19.)

25 The government disclosed search warrants, applications, and results, on Bates
26 # 436, a 1TB hard drive, on October 13, 2015. In addition, the attached search
27 warrant was unsealed by the Court and became a public record of the Court on May
28 26, 2015. Thus, it was available to the defense independently from the inception of
this case on June 10, 2015.

Kareem has argued, in his Supplemental Motion for New Trial and elsewhere,
that knowledge of Simpson's communications with Erick Jamal Hendricks and the
FBI undercover employee would have enabled him to point at other possible
conspirators as motivators and bankrollers of Simpson's and Soofi's attack plans.
The information about which Kareem complains he lacked notice was available as a

1 public record of the Court since before Kareem's arrest on June 10, 2015, and was
2 provided to the defense in discovery on October 13, 2015.

3 Kareem received disclosure of information that the FBI had reason to believe
4 Simpson and Soofi "communicated, conspired, shared or received ideas through
5 their various social media sites," and that Simpson communicated with an FBI
6 undercover employee on or about April 23, 2015 (although Kareem did not have
7 access to the communications themselves). Therefore, the government did not
8 "suppress" the information revealed in the search warrant affidavit. *See United*
9 *States v. Agurs*, 427 U.S. 97, 103 (1976) (*Brady* applies to information unknown to
10 the defense); *Diep v. Cate*, 749 Fed. Appx. 534, 536 (9th Cir. 2018) (citing *United*
11 *States v. Aichelle*, 941 F.2d 761, 764 (9th Cir. 1991) (no suppression when "defendant
12 has enough information to be able to ascertain the supposed *Brady* material on his
13 own")); *United States v. Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009) (same).

14 Conclusion

15 Based on the foregoing, the United States respectfully requests the Court
16 reject Kareem's Addendum in support of his Supplemental Motion for New Trial
17 and the related arguments in Kareem's Reply as untimely. The government further
18 requests the Court find that Kareem possessed the information contained in Search
19 Warrant No. 15-7328MB, as part of its analysis of Kareem's claims in his
20 Supplemental Motion for New Trial.

21 Respectfully submitted this 13th day of September, 2019.

22 MICHAEL BAILEY
23 United States Attorney
District of Arizona

24 *s/ Kristen Brook*
25 *s/ Joseph E. Koehler*
26 KRISTEN BROOK
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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of September, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, and that true and accurate copies have been transmitted electronically to counsel for the defendant via the ECF system.

Daniel Drake & Daniel Maynard, Attorneys for Defendant

By: /s/ Joseph E. Koehler